

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 269104

Wayne Circuit Court

LC No. 05-012286-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver under 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury acquitted him of first-degree murder. He was sentenced as an habitual offender, third offense, MCL 769.11, to consecutive prison terms of 114 months to 40 years for the delivery conviction, 5 to 10 years for the felon in possession conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant claims that counsel was ineffective for failing to request an instruction on possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v), as a lesser offense.

To establish ineffective assistance of counsel, a defendant must show “that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citations and internal quotation marks omitted). He must show that his counsel’s representation “fell below an objective standard of reasonableness” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant “must overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *Id.* A defendant must also demonstrate that his counsel’s deficient performance “was so prejudicial to him that he was denied a fair trial.” *Id.* He must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” *Id.* at 302-303 (citation and internal quotation marks omitted).

In this case, defense counsel made a strategic decision not to deny defendant's involvement with selling drugs but to use that involvement as part of the explanation for the shooting. At trial, there was no dispute that defendant repeatedly shot into a vehicle and killed the decedent. The police chased and then apprehended defendant. When defendant was arrested, he had one packet containing 1.07 grams and 18 packets containing .45 grams of a substance containing cocaine, \$490, and two guns. Defense counsel acknowledged that defendant was a drug dealer and used that to support his position that defendant acted in self-defense:

For you that are lucky that never seen drugs transactions or been on the street and watch people, how they conduct drugs, you're going to have to use your collective memory of how that stuff works. People drive down the street, you got a young man selling dope, they stand on a corner and they sell dope, cars pile up on the side and you walk up to them and you serve them. Car driving down the street, dope man is in front, car flags him, he comes around, backs in next to the store, defendant comes up to serve him the dope. That's why he got \$490.00. He had just made \$490.00 and he got whatever amount of dope they said in his pocket. So he comes around, walks up to the driver's door to serve him. When he serves him at the window, next thing you know, either they sticking him up, they shooting at him, give it up. He jumps to the side, pulls – they shoot, he pulls out his gun, he shoots and starts running this way.

* * *

When you out there selling dope, that doesn't make it right, but that's how dope is sold. And dope selling is a dangerous job. It's an illegal job and it's a dangerous job. And the guys out there, they do carry guns, but that don't give a person the right to say, "Hey, I'm going to rob the dope man, I'm going to--"

* * *

Why would a dope man be on the corner selling \$10.00 rocks and then when somebody pull up, you just shoot them?

But defense counsel also pointed out to the jury that there had been no testimony that defendant was selling the drugs.

You're going to see that he had I can't remember how many pieces of drugs in his pocket and they charging him with Possession With Intent to Deliver drugs. Well, you're going to find him guilty of something because even though I don't believe no one said – prosecutor didn't show anything – this is just me being a lawyer to get some of these things out of the way. Did you hear anybody say he was selling the drugs. I didn't hear it. So you can assume, and maybe the prosecutor wants you to assume that, just like that witness assumed things, but I didn't hear any evidence that he was selling drugs. And I'm not playing anybody being foolish, I'm just saying on the testimony that didn't come out. But if you find him guilty of it, fine, but it was no evidence really showing that. Assumption, maybe.

Had defense counsel requested an instruction on possession as a lesser offense, a conviction was a virtual certainty. By not requesting the instruction, he retained the ability to note the deficit in the evidence of actual sales as a basis for the jury to acquit defendant of the drug charge. Forcing the jury into an “all or nothing” decision on the drug charge was a legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

Defendant argues that the prosecution’s improper argument denied him a fair trial and that counsel was ineffective for failing to object.

Unpreserved issues of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Defendant must establish that an error occurred, that it was plain (i.e., clear or obvious), and that the error affected his substantial rights, which generally requires a showing that it affected the outcome of the trial court proceedings. *Carines*, *supra*. If these requirements are satisfied, this Court must exercise discretion in deciding whether to reverse. Reversal is only warranted “when the forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (Internal quotation marks omitted.)

Defendant cites approximately ten instances of alleged denigration of defense counsel, where the prosecution asserted that the defense was attempting to mislead or distract the jury. Regardless of the impropriety of the remarks, defendant is not entitled to a new trial because the alleged prosecutorial misconduct did not affect defendant’s substantial rights, i.e., influence the outcome of the proceedings. Assuming that the prosecutor’s remarks were improper, the acquittal on the first-degree murder charge shows that the jury found defense counsel and the theory he proposed to be credible. The offenses of which the jury convicted defendant were those that were essentially uncontested by the defense. The remarks did not unfavorably affect the outcome of the trial.

With respect to defendant’s claim that counsel was ineffective for failing to object to the remarks, there is no reasonable probability that the result of the proceeding would have been more favorable to defendant had counsel objected to the remarks. Therefore, defendant is unable to show that the alleged error was prejudicial. *Toma*, *supra* at 302-303.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder